



SENT VIA E-MAIL/FIRST-CLASS MAIL

February 16, 2012

Jeannie Townsend, Clerk to the Board
State Water Resources Control Board
1001 I Street, 24th Floor
Sacramento, California 95814
JTownsend@waterboards.ca.gov

Re: Program of Implementation Alternatives in the Substitute Environmental Document

Dear Ms. Townsend:

Pursuant to the State Water Resources Control Board ("State Board") Revised Notice of Preparation and Notice of Additional Scoping Meeting ("Notice"), the California Environmental Quality Act ("CEQA") requirements, and the settlement in Sacramento County Superior Court Case No. 34-2011-80000955, the San Joaquin Tributary Association ("SJTA") requests the State Board analyze the following alternatives in its substitute environmental document ("SED").

The State Board's Notice includes, as an attachment, the Draft San Joaquin River Fish and Wildlife Flow Objectives Program of Implementation ("Draft Program of Implementation"). The Draft Program of Implementation states the State Board will implement the proposed changes to the narrative San Joaquin River flow objective ("Narrative Objective") by requiring the release of water on a "generally proportional basis from the Merced, Tuolumne, and Stanislaus Rivers." (Notice, at 3.) The Draft Program of Implementation does not specify any mechanism or "program" to implement the proposed Narrative Objective. The Notice indicates the Draft Program of Implementation will be revised to provide further detail in the SED. Indeed, the SED is required to analyze a reasonable range of alternatives in its Program of Implementation. The SJTA provides the following alternatives to be included in the State Board's SED analysis of reasonable implementation alternatives:

Alternative 1: No Action Alternative. The SED should include a no action implementation alternative. Under this alternative, the Narrative Objective would not be amended, existing requirements under D-1641 would remain in place, and the United States Bureau of Reclamation would continue to be responsible for meeting the D-1641 requirements.

Alternative 2: Water Priority Compliance Alternative. The SED should include an implementation alternative based on the water right priority system. Primarily, illegal water uses should be investigated and all unlawful diversions should cease before any legal water user is curtailed. If regulation of legal water use is necessary after eliminating all unlawful uses, junior appropriative water right holders would be required to cease diversions before senior appropriative water right holders are required to curtail water use. The priority of post-1914 appropriative rights is determined by the date a permit application is filed. (See Table II-6, p. II-27, Final Environmental Impact Report ("FEIR") for Implementation of the 1995 Bay/Delta Water Quality Control Plan (Nov. 1999).) The priority of pre-1914 appropriative rights is determined by the date of notice filed under the California Civil Code or by the date water was first put to beneficial use. Pre-1914 and riparian water right holders would not be affected until all post-1914 water users ceased diversions.

This alternative would incorporate the impact of the Watershed Protection Statute on water rights priority. Specifically, the Watershed Protection Statute provides water rights that are used in-basin with priority over water rights that support the transport of water outside the watershed or area immediately adjacent thereto. Therefore, United States Bureau of Reclamation exports out of the watershed would be required to cease before any in-basin water use is curtailed. This was previously Flow Alternative 3 and 4 in the FEIR for Implementation of the 1995 Bay/Delta Water Quality Control Plan, pages II-16 to II-18, and II-26.

Further, this alternative would account for the impact of any applicable stream adjudication and/or any loss of water rights by prescription. Depending on the terms of the applicable stream adjudications and loss by prescription, certain appropriative rights may have priority over riparian rights.

Alternative 3: Upstream Inclusion Alternative. The SED should include an implementation alternative which requires flow from the entire historic San Joaquin River watershed. The stated purpose of amending the Narrative Objective is that "more flow of a more natural pattern is needed." (Notice, at 3.) However, the Draft Program of Implementation proposes to implement the Narrative Objective without any contribution upstream of the Merced River. Historically, approximately 30 percent of the "natural flow pattern" came from the San Joaquin River system upstream of the Merced River. If the purpose of the Narrative Objective is to restore a natural flow pattern on the San Joaquin River, historic or natural flows upstream of the Merced River must be included. Therefore, this alternative would require the State Board to implement the Narrative Objective by including the entire San Joaquin River watershed. Previously in the 1995 FEIR, Alternatives 3 and 4 incorporated flows from the entire watershed, including flows upstream of the Merced River.

Alternative 4: South Delta and Lower San Joaquin Alternative. The SED should include an implementation alternative that restricts water users in the South Delta and lower San Joaquin River from diverting water released upstream for the purposes of meeting the Narrative Objective. Specifically, this alternative should include a mechanism to assure flows released pursuant to the Narrative Objective are not re-diverted downstream for purposes other than meeting the Narrative Objective. This is especially true given the Technical Report's focus on the Basin Plan Amendment for salmon smolt migration through the Delta.

Alternative 5: FERC Free Alternative. The SED should include an implementation alternative that does not rely on the Federal Energy Regulatory Commission ("FERC") process to achieve compliance with the Narrative Objective. Currently, the Draft Program of Implementation suggests the State Board intends to use the FERC licensing proceedings on the Merced and Tuolumne Rivers to implement the Narrative Objective. (Notice, at 5.) The State Board may include the FERC proceeding in its program of implementation. However, the State Board should be cautious about relying too heavily on the FERC proceedings, as there are significant limitations to using the proceedings as a mechanism to satisfy the Narrative Objective.

First, the rules of water right priority require the State Board to undertake a water right proceeding before looking to FERC to satisfy the Narrative Objective. Senior water rights cannot be required to dedicate water to instream uses before junior water rights simply because the right is tied to a project being relicensed. Therefore, regardless of the timing of relicensing, the State Board cannot use the FERC proceedings to require senior water right holders to contribute water to meet the Narrative Objective without first requiring all junior water right holders to cease diversions.

Second, the State Board's regulatory authority through the FERC proceedings is limited to project-related impacts. Therefore, to the extent the State Board wishes to use the FERC proceedings to meet the Narrative Objective, the State Board must first establish that the project undergoing relicensing is causing the Narrative Objective to not be met.

Third, water rights granted before the development of the project are not part of relicensing and therefore cannot be regulated pursuant to the FERC process. This means that the State Board cannot use the FERC proceedings to regulate water rights unrelated to the FERC project, including riparian, pre-1914 and appropriative rights obtained before the project subject to relicensing was developed.

Because of the significant limitations of the FERC proceedings, the State Board should be cautious in its reliance on FERC proceedings as an implementation tool. If the program of implementation improperly relies on the FERC proceedings and this reliance is found to be unlawful, the program of implementation will be invalid. For these reasons, a program of implementation alternative that does not rely on the information or the regulatory power of the FERC proceedings should be analyzed in the SED.

Very truly yours,

O'LAUGHLIN & PARIS LLP



TIM O'LAUGHLIN

TO/tb

cc: SJTA